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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

In re the Marriage of OANH PHAN and
TOM VO.

OANH PHAN,

Appellant,

v.

TOM VO,

Respondent.

G052337

(Super. Ct. No. 06D008566)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Claudia Silbar, Judge. Affirmed.

The Law Offices of Saylin & Swisher, Brian G. Saylin, Lindsay L. Swisher
and Daniela A. Laakso for Appellant.

John L. Dodd & Associates, John L. Dodd and Benjamin Ekenes for
Respondent.

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INTRODUCTION

Oanh Phan and Tom Vo were married in 2000 and separated in 2006. A judgment of dissolution of their marriage and on reserved issues (the judgment) was entered in August 2014. The judgment contains, inter alia, the trial court's finding that commercial property located on Barclay Drive in Garden Grove, which had been managed by Vo during and after the marriage (the Barclay property), was Phan's separate property. Phan did not appeal from the judgment.

Six months after entry of the judgment, Phan filed a request for an order for an "[a]ccounting, determination and order for amount due to [Phan] from [Vo] for rents and other funds received from 2004-2014" for the Barclay property as well as "reimbursement for repairs paid by [Phan]." The trial court denied Phan's request as barred by res judicata because that issue should, and could, have been litigated and resolved at trial or otherwise before the judgment was entered, and Phan did not request that issue be reserved.

We conclude the trial court did not err by denying Phan's request, and therefore affirm.

BACKGROUND

I.

PETITION AND REQUEST FOR LEGAL SEPARATION

Phan and Vo were married in June 2000 and separated on September 15, 2006. On September 22, Phan filed a petition for legal separation. In January 2007, Vo responded to Phan's petition and also filed a request for legal separation. Both Phan's petition and Vo's request requested that "Property rights be determined."

II.

TRIAL ON PROPERTY ISSUES BEGINS.

In June 2014, at the beginning of trial, the court stated that it appeared “the property issues are pivotal issues” and further stated the best way to proceed was to first determine the proper characterizations of the Barclay property and two other Orange County properties, referred to as the Cherrywood property and the Pentagon property, as separate or community property. Phan contended all three properties were her separate property and Vo argued that the Barclay property and the Pentagon property were community property. As to the Barclay property, Phan’s trial brief stated, “[a]s no community property was used in either the acquisition of or maintenance of the Barclay property, [Phan] requests that she receive all of the net rents received from the date of acquisition and from January-May 2014 and thereafter until the property is sold.” The court stated that if the characterizations of the real properties were determined first, “then maybe everything else will fall in place.”

Phan’s counsel told the court that he had a witness who was a tenant at one of the properties, whose testimony would be relevant to “the amount of rents at the properties.” The court responded, “[t]here is a two- to four-day estimate, and as counsel knows in a family law calendar, to try a four-day matter will be very difficult.” The court stated, “[s]o I would prefer to focus on the pivotal issues first, instead of any corollary issue, and maybe then the parties can reach an agreement on the other matters.” Phan’s counsel responded, “[o]kay.” The court reiterated that once the characterizations of the three properties were determined, “then we go into the other issues.”

III.

AFTER THE TRIAL COURT FINDS THE BARCLAY PROPERTY IS PHAN'S SEPARATE PROPERTY, THE COURT RESOLVES ALL OTHER OUTSTANDING ISSUES IN THE MATTER AND DIRECTS PHAN'S COUNSEL TO PREPARE A STATEMENT OF DECISION.

Following a four-day trial, on June 10, 2014, the court stated its findings that, inter alia, the Barclay property was Phan's separate property. The court invited Phan's counsel to call his first witness "on the rest of the issues." Phan's counsel called Phan to testify. After testifying about properties in Riverside, Rialto, San Bernardino, and Nevada, none of which is at issue in this appeal, Phan described her claim regarding the Barclay property, as follows:

"By [Phan's counsel]:

"Q. Ms. Phan, do you allege that your husband owes you any additional moneys in light of the court's ruling on the fact that Pentagon, Cherrywood, and Barclay, that [Vo] has no interest in them, are you still seeking any dollars from Mr. Vo for some other reason that he would owe you money?

"A. The one for the \$45,000 that he signed agreement to pay off for me if—when the apartment sell.

"Q. Okay, but that would be Barclay; correct?

"A. Yes.

"Q. So since the court has awarded you Barclay—

"A. Uh-huh.

"Q. —And you would in essence receive that money, because now—

"A. Okay—

"Q. —you own it—

"A. —Yes.

"Q. —Does he now owe you the money or not?

"A. No.

“Q. Okay, it’s what I want to clarify.”

Phan thereafter testified that she sought half of Vo’s IRA. After counsel for Phan and Vo discussed Vo waiving a right to reimbursement on the Cherrywood property in exchange for Phan waiving an interest in a San Bernardino property, the court asked, “[o]kay, and what other issues are there?”

Phan’s counsel asked that the court clarify an attorney fees order in connection with a prior trial regarding whether Phan and Vo had a valid marriage, and argued about whether interest accrued on unpaid fees in light of the time period during which Vo had pending bankruptcy proceedings. Counsel also discussed whether Vo’s IRA contained community property; the court ruled it did not.

Following that discussion, the court stated, “[n]ext.” Phan’s attorney stated, “[y]es, Your Honor, final matter has to do with the request for attorney’s fees and costs, and I’d like to inquire of my client in that regard.” Before reaching that issue, however, Vo’s counsel asked about spousal support, and the court stated such support and related jurisdiction would be terminated because Vo had paid spousal support longer than the length of the marriage and Phan had sufficient assets.

The court again asked, “[a]ny other issues besides that?” Phan’s counsel responded, “[j]ust to clarify on the attorney’s fees.” The court stated it was not going to rule on attorney fees until it is “the last thing to rule on.” Phan’s counsel said, “[o]h, then, I have nothing further on Ms. Phan.” But then Phan’s counsel brought up one more issue regarding tax deductions that Vo had claimed on the Barclay property. Phan’s counsel stated, “[i]n light of the court’s record, I have the tax returns of [Vo], that for the years 2006 through 2013 he takes substantial deductions on his income tax. [¶] Since the court now awarded that property to [Phan], she has the right to obtain, claim all of that deduction as a result of the depreciation and other matters, because it was an issue that the court decided—decided in her favor. [¶] Otherwise, [Vo] gets the benefit for an asset

that he didn't own." Phan's counsel further stated Vo "claimed a negative on all property."

The trial court pointed out that Phan had not asked for Vo's tax returns and Phan and Vo had a joint obligation to make sure they were legally and properly paying taxes. The court stated it was "not impressed" by how Phan and Vo handled their taxes, thought it was tax fraud, and had been placed in the position of having to determine what to do, and sit and listen to "days and days of testimony of false tax information." The court further stated: "So if you want me to rule on taxes from 2006 to today, we are going back to 2000, they can go back and refile all their taxes, because they are all false, both of them. That's what I suggest they do to avoid any possible criminal liability." The court also stated that awarding Phan depreciation on those taxes did not make sense and should have been brought to the court's attention earlier.

After a break, Phan's counsel informed the court that the issue had been resolved. Counsel stated, "I have spoken to the CPA. At least for purposes of my client, if there needs to be amendments, they will file independently their amendment accordingly. [¶] So we have resolved that outside of the court's involvement."

Phan's counsel asked the court to return to "the last issue" regarding attorney fees. The court again clarified, "[a]ny other issues on the other side of the table besides attorney fees?" Vo's counsel responded, "[n]o."

Again, the trial court clarified, "this is the last issue of the Phan and Vo matter, is that correct[?]" Phan's counsel and Vo's counsel each responded, "[y]es." The court asked, "[t]hen we are done?" Vo's counsel answered, "[y]es."

After the court ruled on the attorney fees issue, it stated, "[o]kay, that will conclude the matter" and directed Phan's counsel to prepare the statement of decision.

IV.

JULY 2014 CORRESPONDENCE BETWEEN PHAN'S AND VO'S COUNSEL CONFIRMS VO'S POSITION THAT RENTS COLLECTED ON THE BARCLAY PROPERTY UNTIL JULY 1, 2014 WERE VO'S PROPERTY.

In a letter dated July 12, 2014, about a month after trial concluded, Vo's counsel stated he was writing in response to Phan's counsel's letter requesting that Vo repair and replace items and provide an accounting for the year 2014 with respect to the Barclay property. Vo's counsel further stated: "Please be advised that the Court had awarded your client Ms. Oanh Phan all three properties includ[ing] the Barclay property. This property ha[d] a current mortgage at the time of trial of approximately \$568,351 and the current market value of approximately \$1,000,000 leaving an equity of approximately \$431,649. The Court made its finding on June 10, 2014, to award this property to your client Ms. Phan and all rents, mortgage, utilities, expenses, and liability are due and belong to Ms. Phan commencing on July 1, 2014. All rents, mortgage, utilities, expenses, and liability before July 1, 2014 belong to Mr. Vo. Mr. Vo has done everything up to June 30, 2014 and he has repair[ed] and maint[ained] the property."

In a letter dated July 15, 2014, Vo's counsel stated, in response to Phan's counsel's July 14, 2014 letter requesting, inter alia, an accounting of the rental income and expenses in 2014 for the Barclay property, that "[w]ith respect to the rental income which Mr. Vo had received, he indicated that were month [*sic*] when the tenants were either unable to make the monthly rental income as they became due or not paying at all. Again, if your client is requesting an accounting, please see . . . our response letter dated July 12, 2014, as the Court had awarded your client Ms. Oanh Phan all three properties includ[ing] the Barclay property. . . . Also, Mr. Vo has turned over all the lease agreements with their respective security deposits for each unit which you had acknowledged in your letter, and further, in our letter dated June 18, 2014, Mr. Tom Vo had not received any rent after June 10, 2014 trial date."

In a third letter to Phan's counsel, dated July 24, 2014, in addition to reiterating what he had stated in his first two letters, Vo's counsel stated, "[p]lease be advised that the Barclay property was a disputed property as it was accumulated and purchased during the marriage, was in Mr. Tom Vo's name on the mortgage loan, was in Mr. Tom Vo's name on the grant deed, was an Internal Revenue Code 1031 exchange, and that Mr. Tom Vo was not merely acting as an agent for purpose of managing the property."

V.

PHAN'S COUNSEL PREPARES THE STATEMENT OF DECISION; THE JUDGMENT IS ENTERED.

On August 27, 2014, the judgment was entered. The judgment stated, "[p]roperty division is ordered as set forth in the attached." The judgment further stated that spousal support was terminated, and awarded Phan \$10,000 in attorney fees. The judgment confirmed the court's findings that the Barclay property and the Pentagon property were Phan's separate property.

Neither the judgment nor the statement of decision referred to the reservation of any issue. Neither one mentioned Vo claiming tax deductions on the Barclay property or whether Vo owed Phan any rent he had collected. Phan did not appeal from the judgment.

VI.

SIX MONTHS LATER, PHAN REQUESTS AN ACCOUNTING OF RENTS VO HAD COLLECTED AND EXPENSES REGARDING THE BARCLAY PROPERTY; VO OPPOSES THE REQUEST; THE TRIAL COURT DENIES PHAN'S REQUEST AND PHAN APPEALS.

In February 2015, Phan filed a request for an order for attorney fees^[1] and "other relief" (capitalization omitted) in the form of an "[a]ccounting, determination and

¹ Phan's February 2015 request as to attorney fees is not an issue in this appeal.

order for amount due to [Phan] from [Vo] for rents and other funds received from 2004-2014 for [the Barclay property], reimbursement for repairs paid by [Phan].” In support of her request for an order, Phan filed a declaration stating that after she had become the owner of record of the Barclay property, an eight-unit apartment building, she began to contact the tenants “to ascertain the status of their individual lease agreements, condition of their units and obtained additional information that had not been disclosed by [Vo] before, during the trial, or thereafter.”

Phan believed she had found inconsistencies in the information that Vo had provided in the marital dissolution case and in his bankruptcy case that he filed in 2009. In her declaration, Phan stated: “I am informed and believe and based on such information and belief allege that [Vo] has received and failed to disclose such receipts of in excess of \$200,000 in rents (including the rents he allegedly paid for unit #1 when he occupied the unit from in or about 2007-2013); \$3,419.75 or more in payment of coins collected for use of the washing/dryer machines by the tenants at the Barclay location, and that he did not pay the electric statement associated with unit #1 when he occupied the unit, but instead used the rentals from the tenants to pay such expense, all contrary to his Schedule J attached to his Bankruptcy filing” She also believed Vo had received a security deposit for one apartment, which he failed to turn over to her. Phan also stated that Vo failed to make needed repairs at the Barclay property.

Vo filed an opposition to Phan’s request, noting that for seven years eight months, Phan conducted extensive discovery on “all of the issues” including those involving the Barclay property, all issues were addressed during the four-day trial, and the judgment was entered. Phan never reserved jurisdiction on any issues and her counsel prepared a statement of decision that did not reserve any issues or refer to Phan’s claim for an accounting or reimbursement for rents collected on the Barclay property. Vo argued that Phan never filed a motion for trial de novo or for reconsideration, and did not appeal from the judgment.

At the hearing on Phan's request for an order for an accounting/reimbursement, the court noted that the issue of reimbursement for rents received by Vo was never raised or requested to be reserved by Phan. The court's minute order stated: "[Phan] waived the right to claims" and she "should have known and should have raised [that] issue at trial. [She] did not bring [the] issue to the court's attention. [¶] The court finds the judgment provided that [Phan] was assisted by counsel, had a full opportunity to present all issues and evidence during trial before submitting to the court concerning all claims." The minute order further stated, "the court denies motion and finds issue is res judicata."

Phan appealed.

DISCUSSION

Phan contends the trial court erred by denying her request for an accounting, determination, and order for amounts that she claimed Vo owed her for rents and other funds, which he had received for the Barclay property since 2004. For the reasons we will explain, Phan's contention lacks merit.

The judgment is a final and conclusive adjudication of Phan's and Vo's property rights because Phan did not appeal from it. (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 851, fn. 13.) "The division of assets and liabilities cannot be modified after it has become final unless there is an explicit reservation of jurisdiction to do so." (*In re Marriage of Farrell* (1985) 171 Cal.App.3d 695, 702.) Here, the trial court did not retain jurisdiction over any issue.

Once a judgment of dissolution becomes final, it can be set aside only by a timely appeal; a set-aside motion pursuant to Code of Civil Procedure section 473, subdivision (b), or after the time for section 473 relief expires; or a set-aside proceeding pursuant to Family Code section 2121. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2016) ¶ 17:340, pp. 17-114 to 17-115.) The grounds and

time limits for a set-aside motion under Family Code section 2121 are contained in Family Code section 2122. Those grounds include actual fraud, perjury, duress, mental incapacity, mistake of law or fact (stipulated judgments only), and failure to comply with certain disclosure requirements. (Fam. Code, § 2122.) Phan did not appeal from the judgment, file a motion under Code of Civil Procedure section 473, subdivision (b), or file a set-aside motion pursuant to Family Code section 2121 or 2122.

Instead, almost six months after the judgment was entered, in February 2015, Phan filed a request for an order for attorney fees and for an “[a]ccounting, determination and order for amount due” to Phan from Vo for rents and other funds, which he had received from 2004 through 2014, and for reimbursement to Phan for repairs she had made to the Barclay property. At the hearing on Phan’s request, the trial court stated in part: “[Phan] has waived the right to make those claims now, and as argued in the opposition, the judgment is res judicata on all issues that were raised or could have been raised at the time of trial. [¶] And clearly, on this issue, that could have been raised, should have been raised, should have been known. [¶] And the record should reflect their case was pending approximately . . . eight years before it went to trial. And the court dealt with it on previous occasions prior to trial, trying to get it resolved, trying to get it going, trying to get it done.”

The court further stated, “[d]iscovery was complete. There is seven years to do discovery, except for—excepting the bankruptcy period. [¶] It just appears to the court—and also, in addition to the fact that it should have been raised and wasn’t raised and wasn’t reserved and should have been known and wasn’t brought to the court’s attention, that it’s res judicata. [¶] In addition to the fact that the judgment itself states that [Phan] had a full opportunity to proceed on all issues and evidence during the trial before submitting it to the court. [¶] And when you take all of that, the totality of the circumstances indicate it’s too late. It’s too late, it’s res judicata. At some point matters need to conclude.”

“‘Res judicata’ describes the preclusive effect of a final judgment on the merits.” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) “The doctrine of res judicata has two distinct aspects.” (*Mitchell v. Jones* (1959) 172 Cal.App.2d 580, 584; *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 530.) In its primary aspect, the doctrine has claim preclusive effect; in its secondary aspect, called collateral estoppel, the doctrine is issue preclusive. (*Clark v. Leshner* (1956) 46 Cal.2d 874, 880; *Ferraro v. Camarlinghi*, *supra*, at pp. 530-531.)

“The doctrine of res judicata, whether applied as a total bar to further litigation or as collateral estoppel, ‘rests upon the sound policy of limiting litigation by preventing a party who has had *one fair adversary hearing* on an issue from again drawing it into controversy and subjecting the other party to further expense in its reexamination.’” (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 257.) The doctrine thus is intended to deter litigants “from bringing repetitive challenges to the trial court’s orders.” (*In re Marriage of Mason* (1996) 46 Cal.App.4th 1025, 1027.) “The burden of proving that the requirements for application of res judicata have been met is upon the party seeking to assert it as a bar or estoppel.” (*Vella v. Hudgins*, *supra*, at p. 257.)

The primary aspect, or claim preclusion form, of res judicata “prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.” (*Mycogen Corp. v. Monsanto Co.*, *supra*, 28 Cal.4th at p. 896.) “If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable.” (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202; see *In re Marriage of Mason*, *supra*, 46

Cal.App.4th at p. 1028; *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 576.)

As a general rule, res judicata does not apply when “the first ruling was not in a *former* action” but instead “was an earlier ruling in the *same* action.” (*Lennane v. Franchise Tax Bd.* (1996) 51 Cal.App.4th 1180, 1185.) Nevertheless, “a prior appealable order becomes ‘res judicata’ in the sense that it becomes binding in the same case” if no appeal is taken. (*Id.* at pp. 1185-1186.) Res judicata “applies to final adjudications rendered in the course of a divorce proceeding over which a court may have continuing jurisdiction and which may require several orders for its ultimate disposition.” (*Wodicka v. Wodicka* (1976) 17 Cal.3d 181, 188.)

Here, Phan’s request sought litigation of whether and to what extent Vo retained net funds from, inter alia, the collection of rents on the Barclay property. As acknowledged in Phan’s trial brief, whether Vo retained funds from the Barclay property was a matter within the scope of the trial determining Phan’s and Vo’s property rights. It was related to the subject matter and relevant to the issues; it could have been raised during trial, but was not. Phan’s and Vo’s property rights were determined after a trial, Phan’s counsel prepared a statement of decision, and the judgment was entered. Phan was aware of the possibility that Vo might have retained net funds obtained by collecting rent on the Barclay property, yet she failed to conduct discovery on that issue, request an accounting before or at trial, request that jurisdiction be reserved on that issue, or otherwise raise that issue from the time trial commenced until the judgment was entered. Under those circumstances, the trial court did not err by denying Phan’s request on the ground it was barred by res judicata.

In her opening brief, Phan argues insufficient evidence supports the finding she had stipulated that she had no claim for reimbursement. Whether Phan entered such a stipulation or not, does not matter. For the reasons discussed *ante*, her request was barred

by res judicata because it was an issue that could have and should have been raised at trial including before the judgment was entered.

Phan also argues the Barclay property rents issue should not be deemed to have been adjudicated, but was, in essence, an omitted asset, within the meaning of Family Code section 2556, which provides the court has continuing jurisdiction “to award *community* estate assets or *community* estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding.” (Italics added.) Phan did not cite Family Code section 2556 in her memorandum of points and authorities, which she filed in support of her request. In any event, section 2556 is inapplicable because Phan seeks adjudication of her separate property, not a community property asset, which, she claims, had not been adjudicated by the judgment.

In her reply brief, Phan cites *In re Marriage of Walker* (2006) 138 Cal.App.4th 1408, in support of her argument that Family Code section 2556 applies to Phan’s separate property. That case does not cite, much less analyze, section 2556, but was a fiduciary duty case. (*In re Marriage of Walker, supra*, at p. 1414.) This appeal is not about duty, but about the applicability of res judicata.

Phan’s reliance, in her opening brief, on *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, is also misplaced. In that case, the husband concealed the existence of *community* assets. (*Id.* at p. 1152.) Here, before the judgment was entered, Phan was fully aware that Vo managed the Barclay property and collected rent on the Barclay property. She also knew it was Vo’s position that he was entitled to retain all the rents that he had collected on the Barclay property before the date the trial court found the Barclay property was Phan’s separate property. Phan failed to conduct any discovery on the amount of rents, which Vo had collected, or request that the trial court reserve jurisdiction on that issue to permit such discovery. *Rubenstein v. Rubenstein* is therefore inapposite in several important respects.

We find no error.

DISPOSITION

The postjudgment order is affirmed. Respondent shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.